UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

In the Matter of

THE PAINTING CONTRACTOR, LLC

and

INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, AFL-CIO, CLC, DISTRICT COUNCIL 6

Cases 09-CA-248716
09-CA-250898

RESPONDENT THE PAINTING CONTRACTOR, LLC'S ANSWERING BRIEF TO THE GENERAL COUNSEL'S AND THE UNION'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION AND THEIR BRIEFS IN SUPPORT

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I. INTRODUCTION

Respondent The Painting Contractor, LLC ("TPC"), under Sections 102.46 of the National Labor Relations Board's Rules and Regulations, files this Answering Brief to the General Counsel's and the Union's Exceptions to Administrative Law Judge Geoffrey Carter's decision issued on February 26, 2021. Judge Carter correctly concluded that TPC effectively withdrew from the Greater Cincinnati Painting Contractors Association (the "Association"); that TPC's notice of withdrawal was timely, unequivocal, and effective on May 21, 2019[1]; that TPC did not nullify its withdrawal; that TPC was not bound by the tentative agreement for the new Collective Bargaining Agreement the Association and the International Union of Painters and Allied Trades, AFL-CIO, CLC, District Council 6 (the "Union") entered into on May 28; that TPC did not violate Section 8(a)(5) of the Act when it unilaterally implemented its proposal on November 1; and that TPC's contract proposal was not regressive.

For the reasons in this brief, the General Counsel's and the Union's exceptions to Judge Carter's decision, including his factual findings, analysis, and legal conclusions lack merit. The Board should uphold Judge Carter's findings.

II. ARGUMENTS

A. Judge Carter Correctly Applied Board Law To Conclude That The Association And The Union Mutually Consented To Withdrawals After Negotiations Start Through The Explicit Language of Article XIX Of The Old CBA (General Counsel's Exceptions 1, 2, and 8).

Judge Carter correctly applied Board precedent to conclude that the Association and the Union mutually consented to allow contractors to withdraw from the Association—and from any collective bargaining agreement resulting from negotiations between the Association and the Union— and negotiate separately by sending written notice at least three days before any extension

[1] All dates moving forward are in 2019 unless otherwise stated.

was executed (ALJD p. 19, ll. 18-29, n.5; JX 1, p. 20).[2] Indeed, the cases Judge Carter relied on to reach this conclusion clearly state that an agreed-upon contract provision constitutes mutual consent to withdraw, even after negotiations started, if the withdrawing party abides by the agreed upon procedure (ALJD p. 18, ll. 20-45, p. 19, ll. 18-29, n. 11). *Midland Electrical Contracting Corp*, 365 NLRB No. 87, n.5 (2017)(had the parties' agreement contained a clause allowing for withdrawals post negotiations, as is the case here, the Board would have found mutual consent and would have enforced the withdrawal provision); *Acropolis Painting*, 272 NLRB No. 37 (1984)(holding employer could withdraw from the multi-employer unit even though negotiations had begun because language in the collective-bargaining agreement between the employer association and the union constituted mutual consent to the withdrawal). Judge Carter's conclusion is also supported by Supreme Court and federal appellate precedent. *Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 420 (1982)(Stevens, J., concurring)(noting an employer's right to withdraw from multi-employer bargaining group based on an agreed-upon contingent occurrence)[3]; *Sheet Metal Workers Int'l Assn., Local 104 v. Simpson Sheet Metal, Inc.*, 954 F.2d 554, 555 (9th Cir. Cal. January 21, 1992)("The ability to withdraw from a multiemployer bargaining unit is therefore limited by the agreement of the parties. In order to be effective, withdrawal must be carried out as specified in the agreement creating the multiemployer unit.").

[2] References to Judge Carter's Decision are designated as (ALJD __), references to the General Counsel's Exceptions and Brief in Support of its Exceptions are designated as (GC Except __) and (GC Brief __), references to the Union's Exceptions and Brief in Support of its Exceptions are designated as (U Except __) and (U Brief__), references to the hearing transcript are designated as (TR__); references to the joint exhibits are designated as (JX__) and page numbers on the joint exhibits track the bookmarked pages; and references to Respondent TPC's exhibits are designated as (RX__).

[3] "The Court's holding does not preclude an employer from explicitly conditioning its participation in group bargaining on any special terms of its own design. Presumably, an employer could refuse to participate in multi employer bargaining unless the union accepted the employer's right to withdraw from the bargaining unit should an impasse develop."

As Judge Carter noted, Article XIX of the Association's and the Union's "Old CBA" constituted mutual consent and governed the rules for when a member of the Association can withdraw and bargain separately with the Union (ALJD p. 19, ll. 18-29, n.5). Article XIX of the Old CBA states that:

> Any contractor that decides to withdraw from The Greater Cincinnati Painting Contractors Association and negotiate separately, may only do so at the expiration of this Agreement, provided such contractor provides written notice of withdrawal to the Union and the Association not more than 120 days before and not less than 90 days prior to the expiration date of this Agreement ***or*** **by written notice to the Union and the Association at least 3 days before any extension of this Agreement is executed by the Association.** The foregoing constitutes the entire contact conditions of employment hereto, and no verbal Agreements are binding.

(ALJD p. 4, ll. 44-47, p. 5, ll. 1-7; JX 1, p. 20)(emphasis added.)

Article XIX expressly sets out two separate times and procedures for withdrawal. The first allows for withdrawals at the expiration of the CBA provided the withdrawing party gives notice "not more than 120 days before and not less than 90 days prior to the expiration date." The second, as Judge Carter correctly concluded, allows for withdrawals after a notice is given at least three days before any CBA extension.[4] (ALJD p. 18, ll. 36-44). There are no other conditions (JX 1, p. 20). ("The forgoing constitutes the entire contact conditions of employment hereto, and no verbal

[4] The Union, consistent with this interpretation, understood that TPC had withdrawn from the Union and was bargaining for itself (ALJD p. 20, ll. 6-8; JX 8)("PDC 6 understood, from TPC's previous notice on May 17 that it was representing itself in the video conference yesterday."). Moreover, the General Counsel's argument that both Article XIX withdrawal procedures require notice before negotiations start, (GC Brief 17), is clearly contradicted by Article XIX's language, which contemplates future extensions of the agreement (which the Union admits typically occur after negotiations have started) (*see* TR 104)(" Q. And it's very common in union negotiations for the parties to sign short extensions in order to allow negotiations to continue when a contract is about to expire or has expired; is that correct? A. It's common, yes."). The General Counsel's argument is also contrary to *Midland*, *Acropolis*, *Bonanno*, and *Simpson Sheet Metal* allowing parties to mutually consent to withdrawals after negotiations have started. *See supra*.

Agreements are binding"). The parties could have included an exception for any tentative agreement subject to ratification, but did not.

The General Counsel and the Union erroneously rely on *Retail Assocs., Inc.*, 120 NLRB 388 (1958); *NLRB v. Sw. Colo. Contractors Asso.*, 379 F.2d 360 (10th Cir. 1967); *NLRB v. Tulsa Sheet Metal Works, Inc.*, 367 F.2d 55 (10th Cir. 1966), *NLRB v. Sheridan Creations, Inc.*, 357 F.2d 245 (2d Cir. 1966), and *NLRB v. Sklar*, 316 F.2d 145 (6th Cir. 1963) for the proposition that TPC could only withdraw before negotiations for a new CBA started (GC Except 14-17; U Except 6-7). There were no mutually consented, post-beginning-of-new-CBA-negotiations withdrawal clauses in those cases.

Accordingly, the Association and the Union mutually consented to Article XIX of the Old CBA, which gave TPC, and any other contractor, the right to withdraw and bargain separately if it gave notice at least three days before any Old CBA extension.

B. Judge Carter Correctly Concluded that TPC's Withdrawal Notice Was Timely And Unequivocal, That TPC's Withdrawal Became Effective on May 21, That TPC Did Not Nullify Its Withdrawal, And That TPC Was Not Bound To The Association And The Union's New CBA (General Counsel's Exceptions 3, 4, 4 [sic], 5, and 8 and the Union's Exceptions 1 and 2).

i. TPC's Timely and Unequivocal Withdrawal Became Effective on May 21.

Contrary to the General Counsel and the Union's exceptions, Judge Carter correctly concluded that TPC's notice was timely. Article XIX of the Old CBA provided that TPC could withdraw by giving notice to the Union and Association at least three days before the Association executed any extension. (ALJD p. 19, ll. 31-36). TPC gave this notice on May 17—which the Union admits receiving and which the Union negotiators admit "tracked exactly the language of Article XIX" (ALJD p 5, ll. 13-33; JX 36, ¶ 17; JX 4; TR 105-107, 148). The Association and Union did not execute an extension within three days after receiving TPC's notice (ALJD p. 19,

ll. 31-36). The Association and Union did eventually execute a third extension on May 28; more than three days after TPC sent its notice (JX 36, ¶ 23, JX 6).

Judge Carter also correctly concluded that TPC's notice was unequivocal (ALJD p. 19, ll. 38-40, p. 40, ll. 1-35). On May 17, TPC sent the Union and the Association notice of its intent to withdraw from the Association and to bargain separately. TPC's notice stated,

> Pursuant to Article XIX of the Agreement, if there is a further extension of the Agreement, then this is TPC's notice of withdrawal from the Association, contemporaneous with such extension. TPC would thereafter negotiate separately with the Union on its own behalf for a new agreement to be effective after the extension expires.

(ALJD p. 5, ll. 13-33; JX 4)

TPC's unequivocal notice clearly provided that TPC intended to negotiate separately for its own agreement (ALJD p. 20, ll. 10-35). As Mr. Sherwood admitted, he read the notice the day it was sent and understood that it "tracked exactly the language in Article XIX of the Old CBA" (TR 105-107). In accordance with Article XIX, the Union and Association could have prevented TPC's withdrawal by signing an extension within three days after receiving the notice, but did not do so. Accordingly, because TPC followed Article XIX to the letter, and because there was no extension within three days after TPC sent its notice of withdrawal, Judge Carter plausibly concluded that TPC effectively withdrew from the Association on May 21 (ALJD p. 20, ll. 12-15). *See Simpson Sheet Metal*, 954 F.2d at 555 ("[i]n order to be effective, withdrawal must be carried out as specified in the agreement creating the multiemployer unit.").

Indeed, the Union understood that, following TPC's notice of withdrawal, TPC was representing itself at future meetings (ALJD p. 20, ll. 6-8, ll. 18-21; JX 8)("PDC 6 understood, from TPC's previous notice on May 17, that it was representing itself in the video conference yesterday."). Neither the General Counsel nor the Union excepted to this finding and the Board

should preclude them from arguing that the Union believed otherwise (*see* GC Except and U Except). Indeed, the Union confirmed this belief in an email dated May 29, a day *after* the May 28 meeting (see JX 8). The Union also admits that TPC "was explicit in announcing TPC's intention to withdraw from the Association and negotiate separately" (U Brief 3).[5]

The General Counsel's and the Union's arguments that TPC's notice was conditional is a red herring (GC Brief 19; U Brief 3). TPC believed that the occurrence of an extension[6] was a condition subsequent (an occurrence that brings a legal duty to an end)[7] and that without the extension reference in the notice of withdrawal, the notice would not have complied with Article XIX.

Accordingly, the "conditional withdrawal" cases the Union cites in its brief in support of its exceptions are easily distinguishable (U Brief 3). In both *Univ. Insulation Corp.*, 149 NLRB No. 124 (1964) and *NLRB v. Jeffries Banknote Co.*, 281 F.2d 893 (9th Cir. 1960), the withdrawing entities *unilaterally* conditioned their withdrawal on whether the Union would negotiate terms to be included in a new bargaining agreement. Here, as noted above, the "condition" was an occurrence that brought a legal duty to an end by mutual consent —not unilateral new terms to be bargained over. TPC believed that the "condition," by Article XIX's language, had to be included

[5] Moreover, Judge Carter's finding that TPC's withdrawal was effective before the May 28 meeting should be affirmed because the Union believed this to be so, which means there was no "meeting of the minds" at the May 28 meeting as to an Association-Union tentative agreement that would have included TPC. For this purpose, it does not matter whether this perceived withdrawal was effective May 21 or May 27 (or any date in between); what matters is that the Union admitted and Judge Carter found that the Union viewed TPC as representing only itself at the May 28 meeting.

[6] A contract extension can also be characterized as a "condition precedent" to the Union's and TPC's duty to bargain separately for a new agreement.

[7] "The term 'condition subsequent' defines a provision, an occurrence of which will terminate an existing liability. Condition precedent defines a provision which must occur before liability arises." *ABC Bev. Corp. & Subsidiaries v. United States*, No. 1:07-cv-51, 2013 U.S. Dist. LEXIS 201415, at *13 (W.D. Mich. Mar. 28, 2013).

in the notice of withdrawal. *See Supra*. The Union accepted this notice as unequivocal withdrawal, effective before the May 28 meeting (ALJD p. 20, ll. 6-8, 18-21; JX 8).

ii. TPC Did Not Nullify its Withdrawal Through its Negligible Participation in the May 28 Bargaining Meeting between the Association and the Union.

Judge Carter correctly concluded that TPC's conduct after sending its notice of withdrawal was always consistent with its intent to withdraw (ALJD p. 20, ll. 10-35, n.12). After the Union membership rejected the second tentative agreement on May 23, the Association reached out to the Union to resume negotiations. TPC—believing it was still part of the Association unless and until another extension was signed—informed the Association that it would oppose any third tentative agreement, but would favor an extension (believing this was required to effectuate its withdrawal). (ALJD, p. 5, ll. 35-45, p. 6, ll. 1-3., p. 20, ll. 14-17.) Since the Union was already on notice of TPC's withdrawal (indeed, it had accepted this outcome), no further notices to the Union were required (ALJD p. 20, ll. 6-8, ll. 18-21; JX 8).

Moreover, TPC's "participation" in negotiations for a third tentative agreement was entirely silent. TPC's silence coupled with its notice of withdrawal cannot be interpreted as "silent affirmation" to be bound to the Union and the Association's tentative agreement. Judge Carter correctly held that TPC's negligible participation in the negotiations with the Association and the Union did not nullify its withdrawal. (ALJD p. 6, ll. 11-17 p. 20, ll. 10-35, n.12.) *Int'l Ladies' Garment Workers' Union*, 286 NLRB 226, n. 2, 231(1987)(an employer representative's presence at, and limited participation in, a multiemployer bargaining meeting was not inconsistent with employer's timely and unequivocal withdrawal because the representative was not a negotiator for the Association and there was no evidence that he took any role in the negotiations).

iii. TPC Did Not Try to Have "The Best of Both Worlds."

Judge Carter also correctly concluded that TPC did not "try to have the best of both worlds" nor did TPC attempt to secure favorable terms in the Association's new contract with the Union (ALJD p. 20, ll. 21-35, n.12). Indeed, the Association and the Union executed a third extension *after* TPC's representative left the negotiation meeting and TPC confirmed its withdrawal upon discovering that a third extension was in place just a few hours later (AJLD p 6, n. 5, p. 8, ll. 4-10). Accordingly, any purported "benefit" TPC received from the strike ending was nominal at best. Contrary to the Union's claim that TPC attended the May 28 negotiations to end the strike, (GC Brief 6; U Brief 7), nothing in the record suggests TPC, individually, cared if the strike ended or not.[8] TPC's sole purpose of attending the May 28 negotiations was to protect its interests in case a third extension did not occur, which Judge Carter concluded was unnecessary to effectuate its withdrawal (ALJD p. 20, ll. 10-16).[9]

iv. In the Alternative, TPC's Timely and Unequivocal Withdrawal Became Effective on May 28 at the Latest.

Even if Judge Carter incorrectly determined that TPC's withdrawal became effective May 21, TPC's withdrawal became effective, at the latest, on May 28, when the Union and the Association executed a third extension.[10] The Old CBA provided that members may "withdraw

[8] To the contrary, by withdrawing from the Association, TPC was willing to risk continuation or renewal of the strike.

[9] Moreover, Judge Carter correctly distinguished the cases the General Counsel and the Union rely on in their Briefs in Support of their Exceptions for the propositions that TPC nullified its withdrawal or that it sought the "best of both worlds" (ALJD p. 20, n. 12).

[10] There are only two plausible interpretations of Article XIX's second window for withdrawal from the Association—Judge Carter's finding that withdrawal occurred as soon as three days passed without an extension, and TPC's belief at the time that withdrawal occurred when the third extension was signed on May 28. Either way, Article XIX's second window was mutual consent by the Association and Union to withdrawal after bargaining began. And either way, TPC effectively withdrew and was entitled to bargain for a separate CBA with the Union. *See supra*.

from The Greater Cincinnati Painting Contractors Association and negotiate separately . . . by written notice to the Union and Association at least 3 days before any extension of this Agreement is executed by the Association" (ALJD p. 4, ll. 44-47, p. 5, ll. 1-7; JX 1, p. 20). TPC provided this notice to the Association and Union on May 17, and the Association and Union executed an extension on May 28. Earlier on May 28, the Union and the Association reached a tentative agreement for a new collective bargaining agreement, *subject to ratification by the members.* (ALJD p. 5, ll. 13-47, p. 6, 1-25; JX. 6.)

The tentative agreement between the Association and Union is the sole reason for the Union's and the General Counsel's erroneous allegation of unlawful conduct by TPC. The erroneous reasoning is as follows:

1. Despite TPC's compliance with the timely notice requirement for withdrawal from the Association, and fulfillment of the sole condition subsequent when the extension was executed, TPC was bound to the tentative agreement between the Association and Union, and then the New CBA.

2. Therefore, TPC's implementation of its proposal was unlawful.

This reasoning fails as a matter of law based on the undisputed facts for three separate and independent reasons: TPC effectively withdrew in accordance with Article XIX and the Union accepted this outcome, TPC withdrew before the Union membership ratified the third tentative agreement, and the third tentative agreement was not the final agreement between the Association and the Union.

First, given the Association's and Union's execution of the extension agreement, and TPC's timely notice that doing so would free it to negotiate separately, TPC could not have been a party to a tentative agreement, subject to ratification by the Union membership, that was entered

into by the Association and Union earlier that day. When the Association and Union executed the extension agreement on May 28, they knowingly accepted TPC's notice of withdrawal and its freedom to negotiate separately for an agreement to replace the Old CBA.

Indeed, as noted above, TPC's negligible, silent participation at the May 28 negotiation meeting, coupled with the timely notice of withdrawal (which the Union admits "was explicit in announcing TPC intention to withdraw from the Association and negotiate separately" and which the Union understood to mean TPC was representing itself at future meeting)[11] could not have led the Union to believe that TPC assented to the third tentative agreement. *See supra* Section B (i-iii). By voluntarily executing the extension, the Union accepted this outcome.

Second, even if TPC was a party to the tentative agreement (which it was not), TPC *immediately* notified the Union that it would not be bound by any Association agreement and would bargain separately, pursuant to its timely notice of withdrawal and the Association's execution of the extension agreement, before the third tentative agreement was ratified, and thus not binding (ALJD p. 20, ll. 24-26).

An employer may withdraw from a tentative agreement before ratification if the Union made it clear that the agreement would not be final unless ratified by the members. *See Sunderland's Incorporated*, 194 N.L.R.B. 118, n. 1 (1971). Here, the Union made this perfectly clear in Section 3.4 of the Association's and the Union's third extension agreement (JX 36, ¶ 23, JX 6)("*In the event the* Union ratifies a new collective bargaining agreement prior to the expiration of this Contract Extension Agreement . . .")(emphasis added). This confirmed TPC's and the

[11] Indeed, since, in an email dated *after* the May 28 negotiations, the Union understood that TPC was representing itself at the May 28 negotiations, any argument TPC, the Association, and the Union reached a "meeting of the minds" is moot precisely because the Union admittedly knew and understood TPC was not part of the Association (regardless of what TPC believed at that time) (JX 8). *See also* n. 5.

Association's understanding that the tentative agreement was not final unless it was ratified, and, because TPC withdrew before ratification, TPC cannot be bound by the third tentative agreement.

Finally, because the final agreement between the Union and Association, the New CBA, was materially different than the third tentative agreement, TPC cannot be bound, even if TPC was a party to the tentative agreement (which it was not).

On June 5, after TPC told the Union and the Association it had withdrawn from the Association, the Union membership ratified the third tentative agreement (ALJD p. 8, ll. 42-44; JX 36, ¶ 31; TR 72). On or around June 26, the Union and the Association signed a wage sheet for a new CBA based on the third tentative agreement (ALJD p. 9, ll. 7-12; JX 36, ¶ 36[12]; JX 10; TR 149). Neither the third tentative agreement nor the wage sheet became the actual final agreement between the Union and the Association. Indeed, the Union membership met on July 11 and changed the allocation. (ALJD p. 9, ll. 14-19; TR 96, 112, 140-141, 149.) On October 22, the Union sent TPC the final version of the New CBA and it materially differed from the third tentative agreement the Union and Association reached on May 28 (ALJD p. 15, ll. 28-29; JX 36, ¶ 51; JX 11; TR 96, 112, 140-141, 149). For example, the wages for brush and roll, spray, paperhanger, and sandblaster employees as well as the required contributions to pension and health and welfare funds were materially different (*compare* JX 24 and JX 10 with the 5/1/2019-5/1/2021 wage rates and benefit contribution amounts in Article IV of the New CBA (JX 11)).[13]

[12] There is a typographical error in JX 36, p 7. There are two paragraphs numbered 36. This cite is to the second paragraph 36.

[13] $0.69 per hour allocated to wage rates by the 6-26-19 tentative agreement was reallocated to Pension ($0.08) and Health & Welfare ($0.61) benefit fund contributions in the New CBA:

	6-26-19 Wage Sheet based on TA3	**New CBA – Art. IV**
Pension	4.86 per hr.	4.94 per hr.
H&W	5.08 per hr.	5.69 per hr.
Brush/Roller	25.30 per hr.	24.61 per hr.

Accordingly, the New CBA displaced the third tentative agreement. Because TPC was no longer a member of the Association during the post-May 28 New CBA negotiations, and since the New CBA displaced the third tentative agreement, TPC cannot possibly be bound by either agreement.

v. Because TPC Timely, Unequivocally, and Effectively Withdrew from the Association, it had the Right to Bargain Individually with the Union.

In conclusion, regardless of whether TPC's withdrawal became effective on May 21 or on May 28, TPC followed Article XIX's procedure to the letter. Judge Carter's ultimate conclusions that TPC effectively withdrew from the Association, that TPC was not bound to the Association and the Union's new CBA, and that TPC had the right to bargain separately are correct (ALJD p. 19-21).

C. Judge Carter Correctly Concluded That TPC Did Not Violate Section 8(a)(5) Of The Act When It Unilaterally Implemented Its Proposal On November 1 And That TPC's Contract Proposal Was Not Regressive (General Counsel's Exceptions 6, 7, and 8 and the Union's Exception 3).

Judge Carter's conclusion that TPC was privileged to implement its proposals on November 1 is correct. After TPC withdrew from the Association, it was privileged to bargain separately with the Union. (ALJD p. 24, ll. 14-17.) TPC first offered to bargain on May 28 and the Union refused. TPC again offered to bargain on May 30, July 1, and September 13. The Union refused these offers as well. On September 19, given the Union's refusal to bargain for almost four months, TPC declared impasse. (ALJD p. 24, ll. 18-28; JX 26.) Even after declaring impasse, TPC remained willing to bargain with the Union right up until it implemented its proposal on

Spray	25.80 per hr.	25.11 per hr.
Paperhanger	25.30 per hr.	24.61 per hr.
Sandblaster	26.05 per hr.	25.36 per hr.

November 1, but the Union's refusals persisted (JX 34). As Judge Carter correctly held, TPC was right to declare an impasse because, given the Union's conduct, any further offers to bargain would have been futile (ALJD p. 22, ll. 8-16). *Mike-Sell's Potato Chip Co.*, 360 NLRB. 131, 139 (2014); *M & M Contractors*, 262 NLRB at 1472 (employer lawfully implemented unilateral changes after the union avoided bargaining for a period of 7 months); *AAA Motor Lines*, Inc., 215 NLRB at 793-794 (same, after a period of approximately 2.5 months).

Moreover, it is axiomatic that if TPC and the Union have not bargained at all because of the Union's refusal, none of TPC's actions could amount to bad-faith bargaining. *See Times Publishing Co.*, 72 NLRB 676, 683 (1947)("A Union's refusal to bargain in good faith may remove the possibility of negotiation and thus preclude the existence of a situation in which the Employer's own good faith can be tested. If it cannot be tested, its absence can hardly be found.").[14] Thus, the Union cannot claim that any of TPC's actions amount to bad-faith bargaining.

Likewise, Judge Carter correctly held that TPC did not engage in regressive bargaining (ALJD p. 24, ll. 30-41). "The fact that proposals are regressive or unacceptable to the union, or that the union finds the employer's explanations for them unpersuasive, does not suffice to make the proposals unlawful if they are not so harsh, vindictive, or otherwise unreasonable as to warrant a conclusion that they were proffered in bad faith" (ALJD p. 24, ll. 36-41). *Management & Training Corp.*, 366 NLRB No. 134, slip op. at 4 (2018); *National Steel & Shipbuilding Co*. 324 NLRB 1031, 1042 (1997)("[a]bsent other evidence of bad faith, regressive contract proposals are not violative of the Act."). As Judge Carter noted, while TPC's proposal differed from the first

[14] Indeed, a Union violates Section 8(b)(3) of the Act when it refuses to negotiate individually with an employer that lawfully departs a multi-employer bargaining association. *Road Sprinkler Fitters Local Union No. 669, et al. and Lexington Fire Protection Group, Inc.*, 318 NLRB 347 (1995). Here, that is precisely what occurred.

two Association-Union tentative agreements that the Union rejected, "it is debatable whether Respondent's proposal was more or less favorable to union members than [the first two Association-Union tentative agreements], and regardless, Respondent made it clear that it was willing to negotiate with the Union . . . over these or any other contract terms"[15] (ALJD p. 25, ll. 14-17). There is no evidence TPC engaged in bad faith and the Union cites no authority supporting its argument that TPC could not deviate from terms covered by the first and second tentative agreements, which the Union rejected.[16] The Union's dislike of the implemented terms does not mean TPC engaged in regressive bargaining. The Union could have bargained for different terms, but it refused to do so.

III. CONCLUSION

Based on the record as a whole, and for the reasons set forth above, Respondent TPC submits that the Board should reject all of the General Counsel's and the Union's exceptions in their entirety and that the Administrative Law Judge's legal and factual conclusions be affirmed.

(Signatures in the next page)

[15] "On wages, [TPC] offered to increase the wages of several job classifications in exchange for ending contributions to various fringe benefit funds. On pension, [TPC] expressed a desire to stop participating in the pension fund and instead provide a 401(k) program if feasible after paying any penalties for withdrawing from the pension fund. And on healthcare, [TPC] offered to continue participating in the Southern Ohio Painters Health and Welfare Fund if the Union wished, but in the alternative offered to provide employees with the same health care plan that [TPC] provided to employees who were not in the bargaining unit" (ALJD p. 25, ll. 6-13).

[16] The Union's reliance on *Am. Fed'n of Television & Radio Artists v. NLRB*, 395 F.2d 622 (1968) is wrong. The Union never bargained separately with TPC therefore there was no "pre-impasse proposal" to "reasonably comprehend."

Respectfully submitted,

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Dated: April 9, 2021

CERTIFICATE OF SERVICE

This is to certify that on April 9, 2020, a copy of the foregoing Answering to the General Counsel's and the Union's Exceptions was served, via electronic mail where possible and first class mail, postage prepaid upon the following:

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